Supreme Court, U.S.
FILED

97 1156 JAN - 5 1998

OFFICE OF THE CLERK

Record No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JO D. MOLINARY,
TRUSTEE OF THE SUSAN PRUITT CLOUD LAND TRUST,
Petitioner,

v.

POWELL MOUNTAIN COAL COMPANY, INC.,
DOING BUSINESS AS WAX COAL COMPANY,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Walton D. Morris, Jr.*
ATTORNEY AT LAW
Post Office Box 6804
Charlottesville, VA 22906
(804) 293-6616

Attorney for Petitioner

Daniel R. Bieger
COPELAND, MOLINARY
& BIEGER
Post Office Box 1296
Abingdon, Virginia 24212
(540) 628-9525

Attorney for Petitioner

*Counsel of Record

Appellate Printing Services • 2 South 6th Street • Richmond, VA 23219 • (800) 642-7789

43 pp

QUESTION PRESENTED FOR REVIEW

1. Do landowners who sue under the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(f), to recover damages for the unlawful mining of their land satisfy legal cause requirements by proving, first, that they fall within a class of persons that the pertinent regulations are designed to protect and, second, that the harm they sustained was type that the pertinent regulations were meant to prevent?

PARTIES TO THE PROCEEDING

1. Jo D. Molinary, Trustee of the Susan Pruitt Cloud Land Trust, was the Plaintiff in the district court and is the Petitioner here.

2. Powell Mountain Coal Company, Inc., was the Defendant in the district court and is the Respondent here. The Petitioner is informed that Powell Mountain Coal Company, Inc., is a remote (indirect), wholly owned subsidiary of Florida Progress Corporation, a publicly held corporation.

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

Statutory and Regulatory Background 2

The Instant Case 4

REASONS FOR GRANTING THE WRIT 10

THIS CASE PRESENTS AN OPPORTUNITY FOR THE COURT TO DEFINE THE ROLE OF STATUTORY INTENT IN FORMULATING AND APPLYING TESTS FOR LEGAL CAUSE IN DAMAGE SUITS BASED ON FEDERAL STATUTES 10

A. *This Court Has Historically Relied on Statutory Intent in Formulating Tests for Legal Cause in Federal Damage Actions* 11

B. *The Circuits Are in Conflict Concerning the Role of Statutory Intent in Determining Legal Cause* .. 13

C. *The Question is Important and Recurring, and This Case Presents an Ideal Opportunity for Resolving It* 20

CONCLUSION 23

APPENDIX A (Opinion of the District Court) 1a

APPENDIX B (Order of the District Court) 14a

APPENDIX C (Opinion of the Court of Appeals) ... 17a

APPENDIX D (Opinion of the Court of Appeals Denying the Petition for Rehearing) 33a

APPENDIX E (Material Statutes and Regulations) .. 35a

TABLE OF AUTHORITIES

Cases:

Abrahams *v. Young & Rubicam Inc.*, 79 F.3d 234 (2d Cir.), *cert. denied*, _ U.S. _, 117 S.Ct. 66, 136 L.Ed.2d 27 (1996) 13, 14, 15

Associated General Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, (1983) 12, 14, 15

Bennett v. Spear, _ U.S. _, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) 20, 21

Bieter Co. v. Blomquist, 987 F.2d 1319 (8th Cir.), *ert. denied*, 510 U.S. 823 (1993) 19

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 13

Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994) *11*

Cox v. Administrator, U. S. Steel & Carnegie, 17 F.3d 1386 (11th Cir. 1994) *mod. on reh'g.* 30 F.3d 1347, *cert. denied*, 513 U.S. 1110 (1995) 17, 18

Defenders of Wildlife v. Lujan, 504 U.S. 555 (1992) 23

Hodel v. Virginia Surface Mining & Reclamation Ass'n., 452 U.S. 264 (1981) 3

Holmes v. Securities Investor Protection Corp.,
503 U.S. 258 (1992) ..... passim

Illinois Block Co. v. Illinois, 431 U.S. 720 (1977) 19

Imagineering, Inc. v Kiewit Pacific Co., 976 F.2d 1303
(9th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993) .. 19

*Israel Travel Advisory Service, Inc. v. Israel Identity
Tours, Inc.*, 61 F.3d 1250 (7th Cir. 1995), *cert. denied*
_ U.S. _, 116 S.Ct. 1847, 134 L.Ed.2d 948 (1996) .. 19

Kernan v. American Dredging Co.,
355 U.S. 426 (1958) 11

McCarthy v. Recordex Service, Inc., 80 F.3d 842
(3d Cir.), *cert. denied* _ U.S. _, 117 S.Ct. 86
136 L.Ed.2d 42 (1996) *19*

Mendelovitz v. Vosicky, 40 F.3d 182 (7th Cir. 1994) . *19*

Molinary v. Powell Mountain Coal Co., Inc.,
779 F.Supp. 839 (W.D.Va. 1991) 1, 6

Molinary v. Powell Mountain Coal Co., Inc.,
832 F.Supp. 169 (W.D.Va. 1993) 1

Molinary v. Powell Mountain Coal Co., Inc.,
892 F.Supp. 136 (W.D.Va. 1995) 1, 2

Molinary v. Powell Mountain Coal Co., Inc.,
125 F.3d 231 (4th Cir. 1997) 2

Pillsbury, Madison & Sutro v. Lerner,
31 F.3d 924(9th Cir.) 19

Rite-Hite Corp. v. Kelly Co., Inc., 56 F.3d 1538
(Fed. Cir.), *cert. denied sub. nom Kelly Co., Inc. v.*
Rite-Hite Corp., 516 U.S. 867 (1995) *18*

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) .. 21

United Healthcare Corp. v. American Trade Ins. Co., Ltd.,
88 F.3d 563 (8th Cir. 1996) 19

Statutes:

15 U.S.C. § 15 ..... 12, 22

16 U.S.C. § 1540(g) 21

18 U.S.C. § 1964(c) 12, 22

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 8

28 U.S.C. § 1367 6

30 U.S.C. § § 1201-1328 2

30 U.S.C. § 1202(a) 3

30 U.S.C. § 1202(b) 3, 17

30 U.S.C. § 1202(m) 17

30 U.S.C. § 1211(c)(1) 4

30 U.S.C. § 1256(a) 3, 15

30 U.S.C.§ 1257 3

30 U.S.C. § 1257(b)(1)(B) 4

30 U.S.C.§ 1258 3

30 U.S.C. § 1260(a) 3, 16

30 U.S.C. § 1260(b)(1) 3, 15

30 U.S.C. § 1260(b)(6) 4, 15, 16

30 U.S.C. §§ 1267(h)(1) 4, 6

30 U.S.C. § 1268 4

30 U.S.C. § 1270 4

30 U.S.C. § 1270(f) ..... passim

30 U.S.C. § 1271 4

45 U.S.C. §§ 51-60 11

VA. CODE § 45.1-230(B)(1) 4

Regulations

30 C.F.R. Part 946 3

4 V.A.C. § 25-130-773.11(a) 3

4 V.A.C. § 25-130-773.15(b)(2) 3

4 V.A.C. § 25-130-773.15(c)(1) 3

4 V.A.C. § 25-130-778.13(e) 4

4 V.A.C. § 25-130-778.15(b) 4

4 V.A.C. § 25-130-778.15(b)(1) 16

4 V.A.C. § § 25-130-Parts 777-785 3

Miscellaneous

57A Am. Jur. 2d, *Negligence* (1989) 13

Restatement (Second) of Torts (1965) 13, 17, 18

W. Keeton, D. Dobbs, R. Keeton, & D. Owen,
Prosser and Keeton on Law of Torts (5th Ed. 1984) .. 13

No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

JO D. MOLINARY,
Trustee of the Susan Pruitt Cloud Land Trust,
Petitioner,

v.

POWELL MOUNTAIN COAL COMPANY, INC.,
doing business as WAX COAL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Jo D. Molinary, Trustee of the Susan Pruitt Cloud Land Trust, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The district court issued three published opinions: *Molinary v. Powell Mountain Coal Co., Inc.*, 779 F.Supp. 839 (W.D.Va. 1991) (denying a motion to dismiss for lack of subject matter jurisdiction); *Molinary v. Powell Mountain Coal Co., Inc.*, 832 F.Supp. 169 (W.D.Va. 1993) (denying a motion in limine regarding the measure of damages); and *Molinary v.*

Powell Mountain Coal Co., Inc., 892 F.Supp. 136 (W.D.Va. 1995) (resolving all other merits issues). Only the last of these opinions is pertinent to the issues raised by this petition. It is reprinted in Appendix A to this petition. (App. 1a-13a).

The United States Court of Appeals for the Fourth Circuit published its opinion under the style *Molinary v. Powell Mountain Coal Co., Inc.*, 125 F.3d 231 (4th Cir. 1997). This opinion is reprinted in Appendix C to this petition. (App. 17a-32a).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on September 11, 1997. The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing in banc on October 7, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § § 1201-1328 ("the Surface Mining Act") and Virginia's implementing regulations are set forth in Appendix E to this petition. (App. 35a-40a).

STATEMENT OF THE CASE

Statutory and Regulatory Background

Congress enacted the Surface Mining Act to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations" and to "assure that the rights of surface landowners . . . are fully

protected from such operations." 30 U.S.C. § 1202(a) and (b). The statute achieves its goals through "a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 289 (1981). With the approval of the Secretary of the Interior, the Commonwealth of Virginia has administered its own surface mining regulatory program since 1981. 30 C.F.R. Part 946 ("the Virginia program").

Like all regulatory programs under the Surface Mining Act, the Virginia program protects landowners' rights through a permit system. The system:

(1) prohibits coal operators from conducting surface coal mining operations without first obtaining a permit from the regulatory authority, 4 V.A.C. § 25-130-773.11(a), 30 U.S.C. § 1256(a);

(2) imposes a wide range of permit information, planning, and consent requirements, 4 V.A.C. § § 25-130-Parts 777-785, 30 U.S.C. § § 1257, 1258; and

(3) requires the permit applicant to bear the burden of establishing that the application is in compliance with all the requirements of the Virginia program. 4 V.A.C. § 25-130-773.15(b)(2); 30 U.S.C. § 1260(a).

The permitting system prohibits officials from approving any application that does not affirmatively demonstrate that it is accurate and complete. 4 V.A.C. § 25-130-773.15(c)(1); 30 U.S.C. § 1260(b)(1). To be accurate and complete, a permit

application must include, among other things, the name and address of every surface owner of the property to be mined. 4 V.A.C. § 25-130-778.13(e); 30 U.S.C. § 1257(b)(1)(B). In cases where the private mineral estate has been severed from the private surface estate, the application must also include either written evidence of each surface owner's consent or documentation showing that surface owner consent is unnecessary under State law. 4 V.A.C. § 25-130-778.15(b); 30 U.S.C. § 1260(b)(6).

The Surface Mining Act empowers Government regulators to enforce the statute's regulatory programs in a variety of ways. *See* 30 U.S.C. §§ 1268, 1271. In addition, the Secretary and the Virginia regulatory authority are each empowered to suspend or revoke permits for failure to comply with any rules or regulations adopted pursuant to the Surface Mining Act, including those designed to protect landowners' rights. 30 U.S.C. § 1211(c)(1); VA. CODE § 45.1-230(B)(1).

Citizens may supplement Government efforts to enforce the Surface Mining Act through informal requests for inspection or enforcement and through citizen suits. 30 U.S.C. §§ 1267(h)(1), 1270. In addition to compliance and mandamus-type actions, citizens may also bring damage actions to redress injuries to person or property through any coal operator's violation of the statute's implementing regulations, including those that govern the permitting system. 30 U.S.C. § 1270(f).

The Instant Case

The petitioner, Jo D. Molinary ("Molinary"), the Trustee of the Susan Pruitt Cloud Land Trust, represents a certified class of former surface landowners of a fifty acre parcel in Lee County, Virginia, known as "the Pruitt Heirs Tract." During the

mining of that land in 1990, Powell Mountain Coal Company, Inc. ("Powell Mountain") was a joint tenant of both the surface and mineral estates. At that time, Powell Mountain's interest in the surface was approximately 0.14%. (App. 3a).

Using the fictitious name "Wax Coal Company," Powell Mountain applied to the Virginia state regulatory authority under the Surface Mining Act for a permit to mine the Pruitt Heirs Tract and neighboring parcels. Powell Mountain's permit application did not identify "every legal owner of record of the property (surface and mineral) to be mined." App. 20a. More importantly, Powell Mountain's application did not include the written consent of all surface owners to the extraction of coal from the Pruitt Heirs Tract by surface mining methods. *Id.*

When Virginia regulators questioned the need for a lease or some other form of surface owner consent, Powell Mountain assured them that no lease was necessary. App. 3a. Without further inquiry, state regulators took Powell Mountain at its word and issued the requested permit.

Powell Mountain began operations on land that the company and a corporate partner owned in fee. When the mining operation reached the Pruitt Heirs Tract, angry surface owners confronted Powell Mountain's workmen and insisted that they not disturb the land. After checking with management, the workmen brushed these protests aside. In short order they stripped the land of vegetation, pushed aside overlying earth, removed coal by driving a giant screw-like "auger" into the exposed coal seam, and then constructed an industrial haulage road across the mined area. In all, Powell Mountain mined 4,423.51 ton of clean coal from the Pruitt Heirs Tract, which it sold for $190,122.46.

Molinary and a nearby resident requested help from federal regulators pursuant to 30 U.S.C. § 1267(h)(1). Federal officials duly relayed the request to the Virginia regulatory authority. The State then demanded that Powell Mountain document its legal authority to mine the Pruitt Heirs Tract. When Powell Mountain failed to produce any evidence of the right to mine without surface owner consent, Virginia regulators revoked the company's mining permit.[1]

Following the revocation of Powell Mountain's permit, Molinary brought this class action in the United States District Court for the Western District of Virginia. Molinary asserted federal claims for damages pursuant to 30 U.S.C. § 1270(f), alternative damage claims under Virginia law pursuant to 28 U.S.C. § 1367, and a claim for federal declaratory relief. Molinary requested a jury trial on all issues so triable.

The district court first considered and rejected Powell Mountain's motion to dismiss for lack of subject matter jurisdiction. *Molinary v. Powell Mountain Coal Co., Inc.*, 779 F.Supp. 839 (W.D.Va. 1991). On cross-motions for partial summary judgment with respect to liability, the district court ruled for Molinary without issuing a written opinion. The court then convened a jury trial on the sole issue of whether Powell Mountain's violations of federally-approved Virginia permitting regulations were "wilful, reckless, or grossly negligent." App. 21a-22a.

---

[1] Although a state hearing officer attempted to absolve Powell Mountain of intentional wrongdoing by simply terminating the company's permit rights, subsequent administrative review reversed this aspect of the hearing officer's decision and restored the revocation of the company's permit.

At trial, Powell Mountain called Robert Blackstock ("Blackstock") who, as a Virginia permit clerk, had handled Powell Mountain's application for a permit to mine the Pruitt Heirs Tract. R. 250.[2] By the time of the trial, Blackstock had resigned his state position and had become a consultant to Powell Mountain and other coal operators. R. 257.

In an effort to persuade the jury that Powell Mountain had not intentionally or recklessly violated Virginia's permitting regulations, Blackstock testified that it was the State's common practice to approve permit applications that did not comply with the regulatory requirements at issue. According to Blackstock, it was more common than not for the regulatory authority to approve permit applications that (1) identified surface owners only by a family name and (2) included the written consent of less than all affected surface owners. App. 31a.

Because the sole issue at trial was Powell Mountain's state of mind rather than Virginia's vigor in assuring compliance with the law, Molinary had no reason to call Virginia officials to rebut Blackstock's testimony. Proximate cause and efficient intervening cause were no longer at issue. Ultimately, the jury found Blackstock unpersuasive; it returned a verdict that Powell Mountain's actions were in fact wilful, reckless, or grossly negligent. R. 289.

Based on the jury's verdict, the district court entered judgment for Molinary on her federal damage claim for wrongful mining. Applying principles that govern restitution for wilful trespass, the district court awarded Molinary the entire sales price of the coal plus an award of costs and expenses, including attorney fees. App. 11a, 15a. The district court dismissed

---

[2] Citations to "R." refer to the Joint Appendix filed with the court of appeals.

Molinary's remaining federal claims and entered judgment for Powell Mountain on the alternative state law claims.

The parties filed cross-appeals. Powell Mountain challenged (1) the district court's subject matter jurisdiction, (2) Molinary's right under Virginia law to grant or withhold consent to the mining operation, (3) Molinary's proof of proximate cause, and (4) the district court's reliance on principles of restitution in computing damages under 30 U.S.C. § 1270(f). Molinary challenged the district court's determination of the reasonable hourly rates of her counsel.

The United States filed a brief and presented oral argument as amicus curiae urging affirmance of the district court's decision to take jurisdiction of the case. The National Mining Association filed a brief as amicus curiae urging reversal of the jurisdictional ruling.

The court of appeals held that 30 U.S.C. § 1270(f) creates a federal cause of action for damages that result from a coal operator's violation of any federally-approved state rule, regulation, order, or permit issued pursuant to the Surface Mining Act. App. 27a. The court of appeals then held that 28 U.S.C. § 1331 authorizes district courts to take jurisdiction of such actions. App. 29a.

The Fourth Circuit declined to address Molinary's right to grant or withhold consent to auger mining on the Pruitt Heirs Tract. Instead, the court of appeals turned to the question of the legal cause of Molinary's damages. Finding the record "devoid of evidence" that Powell Mountain's violation of the applicable permit regulations caused the auger mining of the Pruitt Heirs Tract without surface owner consent, the court of appeals reversed the district court's decision to grant partial

summary judgment holding Powell Mountain liable on Molinary's federal damage claim.

Instead of remanding the case for trial on the liability issue, the court of appeals proceeded to consider whether the record disclosed an "efficient intervening cause" of Molinary's injury. In doing so, the Fourth Circuit ignored the record before the district court at the time that tribunal decided the parties' cross-motions for summary judgment. Instead, the court of appeals focused on Blackstock's testimony at trial.

The court of appeals held that Blackstock's testimony "establishes that the Pruitt Heirs suffered damage because the permitting officer routinely approved permits based on incomplete permit applications, not because the incompleteness of Powell Mountain's permit application *induced* the permitting officer to approve it." App. 31a. Ignoring the fact that the district court's partial summary judgment in Molinary's favor had removed the issue of efficient intervening cause from the case by the time of trial, the court of appeals deemed Blackstock's testimony "undisputed." Consequently, the Fourth Circuit directed the district court to enter summary judgment for Powell Mountain. App. 32a.

The court of appeals denied Molinary's petition for rehearing and suggestion rehearing in banc. App. 33a-34a. Molinary now seeks review in this Court.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN OPPORTUNITY FOR THE COURT TO DEFINE THE ROLE OF STATUTORY INTENT IN FORMULATING AND APPLYING TESTS FOR LEGAL CAUSE IN DAMAGE SUITS BASED ON FEDERAL STATUTES.

Molinary urges the Court to grant her petition for a writ of certiorari because it provides the Court with an opportunity to resolve a conflict among the circuits concerning the tests for determining legal cause in federal statutory liability actions -- those in which the statute itself grants recovery, creates jurisdiction, or permits special damages. This Court has described legal cause (or "proximate cause") as a label for the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). In this case, the court of appeals misused those tools in a way that frustrates Congress' intent to hold coal operators liable for damages whenever they violate regulations designed to protect surface landowner's property rights.

Stated broadly, the question is whether courts must give statutory intent controlling weight when formulating or applying tests for legal cause that limit the scope of damage suits based on the violation of a federal statute. Among the Circuits there is no consistent method of determining legal cause in such cases. The consideration given to statutory intent in shaping the limits of liability varies among the Circuits from dispositive to non-existent.

The decision of the court of appeals in this case demonstrates how improper reliance on traditional, negligence-based tests for legal cause can thwart Congressional intent to provide statutory remedies for individuals and to authorize private ligitants to supplement Governmental enforcement of statutes. Because the Circuits are in conflict on the role of statutory intent in determining legal cause in federal damage actions and because the issue concerns a judicial doctrine subject to this Court's supervision, the question merits this Court's review.

A. *This Court Has Historically Relied on Statutory Intent in Formulating Tests for Legal Cause in Federal Damage Actions*

In determining appropriate limits of liability in private damage actions based on violations of federal statutes, this Court has historically looked for guidance to Congress' intent in enacting the statute at issue. In cases arising under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, the Court has found that "the general Congressional intent was to provide liberal recovery for injured workers." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958). As a result, the Court has applied a "relaxed standard of causation" under that statute. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532. 543 (1994). Indeed, the Court has allowed recovery under FELA based on statutory violations even where the injuries sustained are not of the type that the relevant statute sought to prevent. *Kernan v. American Dredging Co.*, 355 U.S. *at 432.*

In other statutory contexts, this Court has found that Congress intended courts to draw on common law principles of proximate cause to limit the scope of recovery in private damage

actions for injury to business or property under the Clayton Act, 15 U.S.C. § 15, and the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c). *Associated General Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 529-535 (1983); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. at 265-268. To guide lower courts in defining the reach of statutory liability under the Clayton Act, the Court has identified five important factors: (1) whether the claim is literally encompassed by the statute sued upon, (2) whether Congress designed the underlying statute to forestall the plaintiff's alleged injury, (3) the directness or indirectness of the asserted injury, (4) the potential for duplicative recovery or complex apportionment of damages, and (5) the existence of more direct victims of the underlying statutory violation. *Associated General Contractors of Cal., Inc. v. Carpenters*, 459 U.S. at 537-545. In addressing the legal cause requirement under RICO's private damage provision, the Court emphasized the last three of these factors. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. at 267-268.[3]

Although this Court has formulated different tests for legal cause under FELA on the one hand and the Clayton Act and RICO on the other, the common thread running through the Court's decisions is careful regard for the Congressional intent underlying each statute. Indeed, the Court has emphasized that Congress may, if it desires, specify a broader or narrower scope for a damage statute than courts might otherwise apply.

---

[3] The decision in *Holmes* establishes a general presumption that Congress intends courts to impose proximate cause requirements whenever a statute authorizes recovery of damages based on the violation of a statute or regulation. *Id.* at 265-266. Applied to the Surface Mining Act, this presumption and the absence of statutory text or legislative history to the contrary suggest that the statute incorporates a proximate cause requirement. Molinary has not challenged the existence of a proximate cause requirement at any stage of this litigation.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

B. *The Circuits Are in Conflict Concerning the Role of Statutory Intent in Determining Legal Cause*

Despite this Court's consistent attention to statutory intent in developing its legal cause jurisprudence, the lower courts differ markedly in the weight they give that factor. In the Second Circuit, statutory intent is the guiding principle in determining legal cause. As this case illustrates, the factor plays no role whatever in the Fourth's Circuit's current analysis of the issue. Other courts of appeals pay varying and inconsistent attention to statutory intent in evaluating legal cause, and no circuit other than the Second has adopted a methodology to ensure that statutory intent guides the determination of legal cause in federal damage actions.

In *Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234, 237-238 (2d Cir.), *cert. denied*, __ U.S. __, 117 S.Ct. 66, 136 L.Ed.2d 27 (1996), the United States Court of Appeals for the Second Circuit held that the limits of liability in so-called "suits on a statute" are properly defined by statutory intent rather than the tests used in ordinary negligence cases. This is the prevailing view in American jurisprudence. *See* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts §36 at 224-225 (5th Ed. 1984); Restatement (Second) of Torts §§ 285-288C (1965); 57A Am. Jur. 2d, *Negligence* §§781-786 (1989). The two-part test for legal cause under this view evaluates whether the plaintiff is within the class that the pertinent statute seeks to protect and whether the harm done was one that the statute was meant to prevent. *Abrahams v. Young & Rubicam Inc.*, 79 F.3d at 237.

The Second Circuit identified two important reasons for evaluating statutory liability cases in these terms rather than under the traditional rubric of proximate cause. First, use of proximate cause terminology to dismiss statutory liability cases can lead to confusion when the issue resurfaces in related common law claims. *Abrahams v. Young & Rubicam, Inc.*, 79 F.3d at 238 n.3. Second, where statutes go beyond the common law and create rights of recovery for plaintiffs who, for example, are not "foreseeable" in under traditional proximate cause analysis, the continued use of "proximate cause" language can cause substantial problems in defining the class of plaintiffs for whom Congress has created the cause of action. *Id.*

The test adopted in *Abrahams v. Young & Rubicam Inc.* is entirely consistent with this Court's decisions in *Associated General Contractors* and *Holmes*. The test incorporates all five factors enumerated in *Associated General Contractors*, and thus it encompasses those that the Court reiterated in *Holmes*. By inquiring whether a plaintiff's injury is the type of harm that a particular statute was meant to prevent, the Second Circuit's test necessarily considers whether a claim is literally encompassed by the statute and whether Congress designed the statute to forestall the plaintiff's alleged injury. By analyzing whether the plaintiff is within the class that a statute seeks to protect, the Second Circuit's test also evaluates the directness of the asserted injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the underlying statutory violation.

Despite the merit and widespread acceptance of the test adopted by the Second Circuit, the court of appeals in this case rejected Molinary's reliance on it. Instead, the Fourth Circuit devised a test that misapplies common law standards and entirely ignores statutory intent. The court below failed to

consider that, as a surface landowner, Molinary fell squarely within the only class of persons that the applicable regulations are designed to protect. The Fourth Circuit also ignored the fact that the unlawful mining of Molinary's land without her consent is precisely the sort of harm that the surface owner consent regulations are designed to prevent.[4]

The test for legal cause that the Fourth Circuit formulated and applied in this case illustrates that application of negligence-based notions of proximate cause and efficient intervening cause can thoroughly frustrate Congress' purpose in authorizing private federal damage actions as part of a regulatory scheme. Indeed, avoiding such results is precisely why the Second Circuit and other jurisdictions have adopted a test for legal cause that analyzes statutory intent. *Abrahams v. Young & Rubicam, Inc.*, 79 F.3d at 238 n.3.

The Congressional intent underlying the statute and regulations at issue in this case is unmistakable. The Surface Mining Act prohibits mining unless and until an operator first obtains a permit. 30 U.S.C. § 1256(a). Although the statute prohibits regulators from issuing a permit unless the applicant affirmatively satisfies all regulatory requirements, 30 U.S.C. § 1260(b)(1), the burden of compliance falls squarely on the

---

[4] The Fourth Circuit also ignored all but one of the five factors this Court identified in *Associated General Contractors* as guidelines for evaluating legal cause. Specifically, the court below paid no attention to the fact that Molinary's claim is literally encompassed by 30 U.S.C. § 1270(f) or that Congress designed the Surface Mining Act to forestall the unlawful mining of land in the absence of required surface owner consent. *See* 30 U.S.C. § 1260(b)(6). The Fourth Circuit did not consider whether Molinary's claim presents the potential for duplicative recovery or complex apportionment of damages, which it plainly does not. Finally, the court below failed to consider that surface owners like Molinary are the only victims of the underlying regulatory violations at issue in this case, and thus there can be no more directly injured parties than the plaintiffs here.

permit applicant, not on the regulatory authority. 30 U.S.C. §1260(a).

To protect the property rights of surface landowners, the statute and regulations ordinarily require coal operators to obtain surface owner consent as a prerequisite to the issuance of a mining permit.[5] 30 U.S.C. § 1260(b)(6); *see also* 4 V.A.C. § 25-130-778.15(b)(1). By requiring coal operators to obtain surface owner consent in order to obtain mining permits, Congress made it impossible for operators to physically invade the property of surface landowners without first violating permitting regulations. Congress buttressed this administrative protection by authorizing the recovery of damages under 30 U.S.C. § 1270(f) whenever a citizen's property rights are in fact injured through a coal operator's violation of the regulatory scheme.

In this case, the Fourth Circuit has devised a test for legal cause that denies the statute the effect that Congress plainly intended it to have. The court below not only concluded that Molinary had failed to show that Powell Mountain's regulatory violations were the legal cause of her injury, it held that Virginia's issuance of Powell Mountain's mining permit constituted an "efficient intervening cause" of that injury. For this reason, the Fourth Circuit absolved Powell Mountain of all liability for violating the regulations that govern the issuance of mining permits. App. 31a.

---

[5] In lieu of the written consent of all surface owners, coal operators may provide either (1) a deed by which surface mining rights are conveyed to the operator or its predecessor in title or (2) documentation that surface owner consent is unnecessary under State law. 30 U.S.C. § 1260(b)(6). In this case, Powell Mountain failed to satisfy either alternative.

The notion that a regulatory authority's mistaken issuance of a mining permit is the efficient intervening cause of damage done by an unlawful mining operation is inconsistent with the statutory intent underlying the Surface Mining Act's permit system. Congress vests regulatory authorities with the power to issue permits for the purpose of protecting the public interest. *See e.g.* 30 U.S.C. § 1202(m) (stating Congress' intent to "insure the protection of the public interest through effective control of surface mining operations"). Here that interest includes the protection of the private property rights from infringement as the result of a regulated activity. *See e.g.* 30 U.S.C. § 1202(b) (stating Congress' intent to "assure that the rights of surface landowners . . . are fully protected from [surface coal mining] operations").

When Congress authorizes private damage actions against regulated entities for injuries based on violations of a regulatory scheme, it does so to advance the goals of the underlying statute. In authorizing private damage actions against regulated entities, Congress certainly did not intend for courts to absolve those entities of the economic consequences of their wrongdoing merely because they succeed in manipulating regulators. The Fourth Circuit's application of negligence based legal cause principles to reach this result offends the statute and its underlying purpose.[6]

---

[6] Even from a traditional tort law perspective, regulatory authorities cannot be efficient intervening causes of injuries sustained through violations of the permitting process. An efficient intervening cause is one that is wholly independent of the violation at issue, not one that merely contributes to the violation after the primary actor initiates the chain of causation. *Cox v. Administrator, U. S. Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir. 1994) *mod. on reh'g.* 30 F.3d 1347, *cert. denied*, 513 U.S. 1110 (1995) (holding that "[a] proximate cause is not, however, the same thing as a sole cause . . . a factor is a proximate cause if it is a substantial factor in the sequence of responsible causation"); *see generally* Restatement (Second) of Torts §§442A, 447

(continued...)

The Fourth Circuit's negligence-based test for legal cause cannot be reconciled with the Second Circuit's statutory intent test. In cases arising in the context of regulatory programs, the two tests produce opposite outcomes. The damage claim in this case plainly satisfies the Second Circuit's test because Molinary and those she represents are members of a protected class who have suffered harm that the surface mining regulations were designed to prevent. The Fourth Circuit has reversed judgment for Molinary based on a factor that is wholly irrelevant under the Second Circuit's test in light of the statutory intent to protect the rights of surface landowners and to forestall unlawful mining operations..

Outside the Second and Fourth Circuits, the weight courts give to statutory intent in determining legal cause is inconsistent and often unclear. Some courts apply negligence-based tests, but they do so quite differently than the Fourth Circuit did in this case. *See e.g. Cox v. Administrator, U. S. Steel & Carnegie*, 17 F.3d at 1386 (rejecting an efficient intervening cause defense because the defendants' actions allegedly precipitated the sequence of events leading to harm); *Rite-Hite Corp. v. Kelly Co., Inc.*, 56 F.3d 1538, 1546-1547 (Fed. Cir.), *cert. denied sub. nom. Kelly Co., Inc. v. Rite-Hite Corp.*, 516 U.S. 867 (1995) (relying on statutory intent in devising a negligence-based test in patent infringement cases to avoid results that would frustrate Congressional policy).

In the wake of *Holmes*, several circuits have emphasized "indirect injury" as the primary or exclusive factor in

---

[6](...continued)
(1965). Where a regulated entity like Powell Mountain applies for a permit and then either deceives the permitting authority or takes advantage of its incompetence, issuance of the requested permit may be a contributing cause of subsequent injury, but it can never be an efficient intervening cause.

determining legal cause. *McCarthy v. Recordex Service, Inc.*, 80 F.3d 842 (3d Cir.), *cert. denied* _ U.S. __, 117 S.Ct. 86, 136 L.Ed.2d 42 (1996) (invoking the "direct purchaser" rule announced in *Illinois Block Co. v. Illinois*, 431 U.S. 720, 744 (1977) as an absolute bar to recovery under either the Clayton Act or RICO); *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1325 (8th Cir.), *cert. denied*, 510 U.S. 823 (1993) (defining directness of injury as the "primary consideration"); *United Healthcare Corp. v. American Trade Ins. Co., Ltd.*, 88 F.3d 563, 572 (8th Cir. 1996); *Imagineering, Inc. v Kiewit Pacific Co.*, 976 F.2d 1303, 1311 (9th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993); *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924 (9th Cir. 1994). In none of these "direct injury" cases did the court evaluate the underlying statutory intent. Unlike the Second Circuit, these courts do not analyze legal cause in terms of the class of plaintiffs the pertinent statute sought to protect or the type of harm the statute sought to prevent.

To bring matters nearly full circle, the Seventh Circuit has held that *Holmes* does not automatically preclude recovery of damages for injuries that are transmitted indirectly, and that court has analyzed the legal cause issue in terms of whether plaintiffs fall within the class of persons that a statute is designed to protect. *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir. 1995), *cert. denied* __ U.S. __, 116 S.Ct. 1847, 134 L.Ed.2d 948 (1996). However, other decisions in that Circuit analyze the legal cause issue solely in terms of the directness of injury. *See e.g. Mendelovitz v. Vosicky*, 40 F.3d 182, 185-187 (7th Cir. 1994).

The conflict and confusion among the Circuits demonstrate that there is no consistent analytical framework for ensuring consideration of statutory intent in formulating and applying tests for legal cause in federal damage actions. The

divergent approaches that the circuits currently take in defining legal cause strongly suggest that a consistent analytical framework will not evolve without this Court's involvement. In view of the conflict between the Second Circuit's reliance on statutory intent to determine legal cause in federal damage actions and the Fourth Circuit's adoption of a test that not only ignores but frustrates statutory intent, Molinary respectfully suggests that the time has come for this Court to address the issue.

C. *The Question is Important and Recurring, and This Case Presents an Ideal Opportunity for Resolving It*

The conflict in the Circuits on the role of statutory intent in formulating and applying tests for legal cause in federal damage actions concerns an important and recurring question. This Court has imposed legal cause requirements in federal damage actions arising under FELA, the Clayton Act, and RICO. Following this Court's decision in *Holmes*, the Federal Circuit has held that the requirement exists in patent infringement suits. In this case, the Fourth Circuit has concluded that plaintiffs under the Surface Mining Act must demonstrate that regulatory violations are the proximate cause of their injuries.

In every action arising under these statutes, the issue of legal cause potentially affects the entire course of the litigation, from the plaintiff's standing to pursue the action to the propriety of summary judgment to the plaintiff's entitlement to recover at trial. *Bennett v. Spear*, __ U.S. __, 117 S.Ct. 1154, 1164, 137 L.Ed.2d 281, 299 (1997). The court of appeals decisions cited earlier in this petition demonstrate that the issue is frequently litigated on the appellate level and often determines the outcome

of cases involving substantial sums or important policy considerations.

This Court has granted certiorari to correct the misuse of legal cause to limit the scope of the federal damage action under RICO. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493-500 (1985). The Court later granted certiorari in *Holmes* to ensure that courts affirmatively apply legal cause requirements to preclude RICO claims based on harm that derives solely from injuries sustained by third parties. More recently, the Court granted certiorari to consider whether legal cause considerations, among other factors, deprived water users of standing to challenge a Biological Opinion of the United States Fish and Wildlife Service under the citizen suit provision under the Endangered Species Act, 16 U.S.C. § 1540(g). *Bennett v. Spear*, __ U.S. __, 117 S.Ct. 1154, 1164-1165, 137 L.Ed.2d 281, 299-300 (1997).

The need to resolve the present question is at least as great. Here, the Fourth Circuit has barred surface landowners from recovering damages from coal operators who wrongfully mine land in violation of regulations that require them to obtain surface owner consent. Like the court of appeals in *Sedima*, the Fourth Circuit has wrongly imposed a judicial limitation to foreclose a statutory remedy that Congress designed to achieve an important policy goal. As a result, the Fourth Circuit has stripped surface landowners of federal protection that Congress clearly intended to provide them. 30 U.S.C. § 1270(f).

The Fourth Circuit's test for determining legal cause threatens to foreclose all actions under 30 U.S.C. § 1270(f) for regulatory violations committed in the process of obtaining a mining permit. Because many of the Surface Mining Act's more important measures for protecting citizens and the environment

depend on enforcement of the statute's permitting regulations, the decision below threatens to put these critical aspects of the regulatory program entirely beyond the reach of the statute's citizen suit provision.

The decision below threatens more than just the efficient working of the Surface Mining Act. By summarily rejecting proof of direct injury that would plainly satisfy the Second Circuit's test for legal cause, the Fourth Circuit has clouded the ability of plaintiffs to promote the public interest by bringing damage actions under other federal statutes, including the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) and the Clayton Act, 15 U.S.C. § 15.

This case is an appropriate vehicle for resolving the conflict. In the district court, Molinary proved the essential elements of legal cause under the test adopted by the Second Circuit. Both in the district court and the court of appeals, Molinary advocated adoption of that test in surface mining cases. The Fourth Circuit's reversal of Molinary's judgment based on a factor that is immaterial in the Second Circuit and elsewhere presents the conflict clearly, in circumstances where it is dispositive of the outcome.

CONCLUSION

For all of the foregoing reasons, this petition for certiorari should be granted.

Walton D. Morris, Jr.
Counsel of Record
Post Office Box 6804
Charlottesville, Virginia 22906
(804) 293-6616

Daniel R. Bieger
Copeland, Molinary & Bieger
Post Office Box 1296
Abingdon, Virginia 24212
(540) 628-9525

Counsel for Petitioners

APPENDIX A

[Filed May 24, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Civil Action No. 91-0007-B

JO D. MOLINARY,
Trustee of the Susan Pruitt Cloud Land Trust,

Plaintiff,

v.

POWELL MOUNTAIN COAL COMPANY, INC.,
doing business as WAX COAL COMPANY,

Defendant.

By: Samuel G. Wilson,
United States District Judge

MEMORANDUM OPINION

This is a class action citizen suit for damages pursuant to § 520(f), 30 U.S.C. § 1270(f), of the Surface Mining Control and Reclamation Act (SMCRA), by class representative Jo D. Molinary (Molinary) against Powell Mountain Coal Company,

Inc., d/b/a Wax Coal (Wax Coal).[1] The class -- known as the "Pruitt heirs" -- owns more than a 99 percent undivided interest in the surface rights to a fifty acre tract of land located in Lee, County, Virginia that Wax Coal auger mined without lawful authority. The Virginia Division of Mined Land Reclamation (DMLR) issued Wax Coal a permit to auger mine the property but later revoked that permit and ordered the property reclaimed when it determined that Wax Coal's "right of entry" documents failed to list all record surface owners. This court submitted a single factual question to the jury for its resolution -- whether Molinary had proven by a preponderance of the evidence that Wax Coal was wilful, reckless, or grossly negligent in failing in its permit application to list all the surface owners and in failing to supply documentation that it had the legal authority to extract coal from the Pruitt heirs tract by the auger mining method. The jury found, in effect, that Wax Coal misled DMLR. The court memorializes various rulings and awards damages in accordance with the jury's findings.

I.

In February of 1990, Wax Coal applied to DMLR for a permit to conduct surface mining operations in an area that included part of the tract in question, known as the Pruitt heirs tract. The tract is mountainous and has little commercial value apart from timber and mineral rights. Years before the advent of the SMCRA, the area augured had been surfaced mined by parties unrelated to Wax Coal. The area had not been reclaimed, except by nature, leaving a bench and highwall. Members of the class use the property primarily for recreational

[1] Molinary also asserts a wheelage and haulage claim under the court's supplementary jurisdiction. 28 U.S.C. § 1367. The court finds that Molinary has not proven her damages for her wheelage and haulage claims.

purposes -- hunting, hiking, camping and the like. Wax Coal owns the mineral rights by virtue of an 1887 severance deed. Wax Coal also has an approximate .14% undivided interest in the surface estate. Class members owned the rest. In its application, Wax Coal listed "Pruitt Heirs" as the surface owners of the tract but failed to list the individual owners. Wax Coal also informed DMLR that it had obtained a legal opinion that no lease was required from the surface estate's other owners. Operating on that information, DMLR issued a permit to Wax Coal. Wax Coal then mined, despite strong on site objections by numerous class members, 4423.51 tons of clean coal by the auger mining method from the tract and sold it for $190,122.46. It also hauled 12,321.70 tons of coal from other tracts across the Pruitt heirs' tract.

In November 1990, DMLR determined that Wax Coal had acquired its permit in violation of the state permit requirements -- specifically, that Wax Coal's right-of-entry documents failed to list all record owners. As a result, DMLR revoked Wax Coal's permit, issued a cessation order against Wax Coal, and ordered Wax Coal to reclaim the tracts.[2] On January 16, 1991, Molinary filed the present suit under the SMCRA's citizen suit provisions, § 1270(f), for alleged damages from Wax Coal's mining operation before the permit was revoked.

II.

Wax Coal contends that "paper violations" -- violations in the permitting process as distinguished from violations of

---

[2]Because the appeal of the revocation was pending in the Virginia court system, the court held this case in abeyance at the request of the parties. Later, this court concluded that it should proceed.

environmental performance standards -- are not actionable under 30 U.S.C. § 1270(f). The court finds that contention only partially correct. Section 1270(f) makes actionable all violations of rules, regulations, orders or permits issued under the SMCRA that result in injury.[3] It makes no distinction between violations in the permitting process that result in injury from permit violations or violations of environmental performance standards that result in injury. The key is injury. If there is no attendant injury to property, there is no right of action under § 1270(f). Thus, trivial, immaterial omissions by permit applicants are not actionable. Conversely, significant, material violations -- those that result in real harm are actionable. The wrongful mining of land through manipulation of or deception in the permitting process is no "mere" paper violation; it is, thus, a violation actionable under § 1270(f).

Nevertheless, the court views § 1270(f) as a potential source of conflicting adjudications between the courts on one hand, and the state and federal regulatory authorities responsible for administering the SMCRA on the other. Congress did not intend for the courts to usurp the regulatory authority and discretion of the Secretary and the states under the guise of the citizen suit provisions of § 1270(f). This case, however, does not expand the parameters of congressionally authorized citizen suits by entangling the court in the administrative prerogatives of the Secretary or DMLR. Wax Coal surfaced mined without lawful authority; DMLR revoked Wax Coal's permit and ordered it to reclaim the land; and a jury

---

[3]More particularly, § 1270(f) makes actionable all violations of rules, regulations, orders or permits issued pursuant to Chapter 25 of Title 30 that result in injury. The regulations of a state regulatory authority implementing an approved state program are issued pursuant to Chapter 25 of Title 30. Molinary v. Powell Mountain Coal Co., Inc., 779 F.Supp. 839 (W.D. Va. 1991); see 30 U.S.C. § 1291 (25) & (26); but see Haydo v. Amerikohl Min., Inc., 830 F.2d 494 (3rd Cir. 1987).

found that Wax Coal acted wilfully or recklessly or without regard for the consequences of its actions.[4]

III.

The SMCRA requires permit applicants seeking to surface mine coal on property where the mineral estate has been severed from the surface estate to submit the written consent of the surface owner or a conveyance that expressly grants or reserves the right to surface mine. 30 U.S.C. § 1260(b)(6)(A) & (B). Virginia's regulatory program implementing the provisions of SMCRA requires an applicant to list the name and address of each legal or equitable owner of the surface estate and to describe the legal rights permitting the applicant to enter

---

[4]The jury was specifically asked:

> Has the plaintiff proved by a preponderance of the evidence that defendant acted wilfully, recklessly, or that defendant was grossly negligent in failing in its permit application to list all the Pruitt heirs and in failing to supply documentation that it had the legal authority to extract coal from the Pruitt heirs tract by the auger method?

The jury was instructed as follows as to the meanings of the terms "wilfulness," "recklessness," and "gross negligence":

> One acts willfully when he acts with the specific intent to do something the law forbids. A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse.
>
> One acts recklessly when he consciously disregards a substantial and unjustifiable risk that harm will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
>
> One is grossly negligent when he intentionally fails to perform a manifest duty in reckless disregard of the consequences as affecting the property of another.

and surface mine. Va Regs. §§ 480-03-19.778.13(e) and 480-03-19.778.15(b). Wax Coal maintains that its failure to supply complete "right of entry" information is immaterial because its co-ownership of the surface rights and its deed to the coal gave it the right to mine coal by the auger method without the consent of all surface owners. The court disagrees.

In Virginia, a tenant in common cannot change or alter the common property to the detriment of his contenants without his contenant's consent. The court finds Chosar Corporation v. Owens, 370 S.E.2d 305 (Va. 1988), instructive. In Chosar, a group of contenants owning a fractional interest in a 61-acre tract sought to enjoin Chosar Corporation -- an 85 percent owner -- from mining the tract and from hauling coal across the land. The court held that "the extraction of coal from the . . . tract is material and continuing destruction of the very substance of the mineral estate. [Chosar] had no right to remove coal from the common property without the consent of [the remaining surface owners]." 370 S.E.2d at 307-08. Accordingly, in the present case, Wax Coal, a negligible .14% owner of the surface estate, had no right by virtue of its contenancy to auger mine the Pruitt heirs tract without the consent of the remaining surface owners.

Wax Coal also contends that the language of the 1887 deed gave it the right to mine coal by the auger method. The court, once again, disagrees. In Phipps v. Leftwich, 222 S.E.2d 536 (Va. 1976), the Virginia Supreme Court held that a coal severance deed executed before the advent of surface mining technology in the area where the land is located conveys only the right to remove coal by underground methods. According to the Virginia Supreme Court:

> There is uncontradicted evidence that strip mining was unknown in Dickenson County in 1902 and that the only method of mining then recognized in the area was underground mining, such as shaft, deep, or drift mining. Thus, underground mining was the only kind of coal mining without the contemplation of the parties to the 1902 deed, and therefore, the broad language of the deed is applicable only to underground mining.

Phipps v. Leftwich, 222 S.E.2d at 540 (emphasis added). In Phipps, the severance deed for the Dickenson County, Virginia tract was executed in 1902 -- almost fifteen years after the deed was executed that created the coal estate at issue in this case in nearby Lee County, Virginia. It follows that the only rights that the severance grantor conveyed were (1) the coal in place and (2) the right to remove it by underground mining methods. The severance grantor retained the right to use the surface without interference from the mineral owner, other than those surface effects associated with the underground mining methods that did not remove subjacent support for the surface. See Stonegap Colliery Co. v. Hamilton, 89 S.E. 305, 310 (Va. 1916).[5] For the

---

[5] Wax Coal argues that auger mining is a less intrusive form of surface mining than strip mining and that Phipps had no occasion to determine whether the owner of the mineral rights could properly auger mine although it could not strip mine. The court believes Wax Coal wrongly focuses on the extent of surface injury as Phipps' rationale. Phipps had more to do with the intentions of the parties than with the extent of surface injury. Surface mining was virtually unheard of or at least not employed in Southwest Virginia at the time the deed in Phipps was executed. Mining was below ground, leaving intact the surface estate. Surface mining was not within the contemplation of the parties and, therefore, was not authorized under those earlier deeds.

(continued...)

reasons stated, Wax Coal's violations of the permitting process were material.

The parties have submitted the issue of damages to the court. At an earlier stage of the case, Wax Coal moved in limine for the court to articulate the method for determining the measure of damages. The court found that motion premature. Nevertheless, the court noted:

> Assuming that Molinary's allegations are true, and Molinary proves that Wax Coal acted willfully, the appropriate measure of damages might include any actual damage as well as any benefit Wax Coal derived from the unlawful use of the land. However, at this juncture, any determination as to how to measure that benefit would be premature. Moreover, on a fully developed factual record a more appropriate remedy might appear.

Molinary v. Powell Mountain Coal Company, Inc., 832 F.Supp. 169, 172 (W.D. Va. 1993). Having the benefit of the jury's determination that Wax Coal's omissions resulted from wilfulness, recklessness or gross negligence, and the benefit of

---

[5](...continued)

Wax Coal also denies that it extracted coal by "surface mining methods" because an earlier mining operation initially exposed the seam of coal, and thus, Wax Coal simply removed another coal company's abandoned materials. The court finds this argument meritless. Essentially, Wax Coal is arguing that a surface owner that consents to some surface mining is powerless to prevent non-consensual surface mining. Moreover, video-taped evidence received at trial graphically shows substantial additional injury to the surface estate.

a more fully developed factual record, the court imposes judgment.[6]

Ordinarily, injury to the surface estate constitutes one of the largest items of recoverable damages in an action under § 1270(f). But an award for injury to the surface estate also presents, given the authority of DMLR or the Secretary to order reclamation, a potential double recovery problem, as well as a conflicting adjudications problem. And those problems loomed in this case because class members sought, through administrative channels, to compel more extensive reclamation.[7] Against that backdrop, Molinary, on the eve of trial, agreed to withdraw class claims for damage to the surface estate that probably would be mooted by reclamation and to pursue reclamation through the administrative process.[8] The withdrawal of that item of damage leaves loss of use, which has been stipulated to be nominally valued at $500.00, and the benefit Wax Coal derived from mining the tract as the remaining sources of a damage award. The recoverability of

---

[6]Wax Coal objected to the inclusion of gross negligence in the special interrogatory to the jury. The court included gross negligence in the special interrogatory, however, because Virginia cases and cases from other jurisdictions find it to be an appropriate predicate to a higher measure of damages. See Bostic v. Whited, 93 S.E.2d 334 (Va. 1956). Moreover, the court stringently defined gross negligence. See infra text accompanying note 4.

[7]The federal Office of Surface Mining Reclamation and Enforcement ("OSM") refused to cite Wax Coal for any reclamation violation. Molinary appealed that decision to the United States Department of the Interior Office of Hearings and Appeals, and the reclamation issue is currently before that office.

[8]Wax Coal, under 28 U.S.C. § 1927, seeks to recover from opposing counsel personally its costs, expenses, and attorney's fees attributable to its preparation for reclamation related issues. The court reserves that collateral issue for resolution when the court resolves Molinary's claim for attorney's fees and expenses.

that latter item of damage has generated the most controversy, and the court now turns to that issue.

Wax Coal essentially ran roughshod over the rights of the surface owners -- from the beginning of the permitting process to the beginning of on site operations when angry surface owners confronted Wax Coal as it bulldozed its way through the property.[9] Under the circumstances, in the court's view, the most closely analogous precedent to guide the measure of recovery is found in cases involving "bad faith" trespassers:

> Bad faith trespassers who sever minerals or timber from the soil are usually subjected to "harsh" measure of damages -- the value of the severed article itself, not merely the value of the right to mine or harvest it. This value is figured at some point after the article is severed,

---

[9]Although Wax Coal's permit application listed the Pruitt heirs as having an interest in the surface estate, its correspondence with DMLR seemed designed to convey a different message, as evidenced by correspondence from Wax Coal's president to the Commissioner of DMLR:

> As a representative of the owner of the surface upon which this permit is located, I request that, upon the completion of the mining, the surface be returned to unmananged forest.
>
> I also request that any roads that are constructed upon this property be left intact upon the completion of mining for forest fire control and management of this and adjacent property.

(Pl. Ex. 1.) (emphasis added). When questioned about its legal authority to surface mine, Wax Coal obtained a legal opinion that it could mine the property based upon its representation that no excavation would occur. Wax Coal then represented to DMLR that it had sought and obtained a legal opinion that consent to mine was unnecessary.

> perhaps even after it is in some manufactured state, and the bad faith trespasser is given little or no credit for costs of mining or transporting or milling the article.

1 Dobbs, Law of Remedies § 5.3(3) at 744 (2d ed. 1993). Virginia, like many jurisdictions, permits that higher measure of damages in "bad faith" trespass cases, the value of wrongfully mined coal as measured by its sale price. See Payne v. Consolidated Coal Company, 607 F.Supp. 378, 381-82 (W.D. Va. 1985); see generally Mullins v. Clinchfield Coal Co., Inc., 227 F.2d 881 (1955); Bostic v. Whited, 93 S.E.2d 334 (Va. 1956).[10]

In the present case, the sales price of the unlawfully mined coal was $190,122.46. That amount greatly exceeds the fair market value of the Pruitt heirs tract. But like other environmental statutes, the SMCRA was designed to protect more than simply transitory, economic interests. See generally Ohio v. United States Dep't of the Interior, 880 F.2d 432 (D.C. Cir. 1989). Moreover, § 1270(f) would do little to discourage the kind of intentional conduct that occurred in the present case if damages were limited to the value of the surface estate or to the theoretical value of consent rights, consent that was not obtained.[11] Accordingly, the court will measure damages as it

---

[10]Wax Coal correctly argues that it owned the coal and that it was not a trespasser because of its negligible .14% ownership of the surface estate. The court still finds "bad faith" trespasser cases analogous because Wax Coal lacked consent or lawful authority to surface mine.

[11]Wax Coal argues that it would be arbitrary to award damages based upon a "benefits received" analysis because it owned the coal. The court disagrees with Wax Coal's argument.

First, a pure "value-of-the-right-exercised" analysis would hardly

(continued...)

would in the case of a "bad faith" trespasser and award Molinary $190,122.46.[12]

---

[11](...continued)
discourage future misconduct. Under such an analysis, it would matter little, economically speaking, to the owner of the coal who has no right to surface mine whether he obtains consent or simply mines the coal without authority and pays for the value of the right exercised only after a court orders him to pay. If a "benefits received" analysis appears punitive, it is, nonetheless, appropriate, as a provision that authorizes the imposition of damages, in the absence of a contrary intent, carries with it the authority to award punitive damages. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984) ("[O]ur inquiry is not whether Congress expressly allowed punitive damage awards. Punitive damages have long been a part of traditional state tort law."); see Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 70-71 (1992) ("The general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."). Second, determining the value of the consent rights of property owners that have not or would not consent would be a tenuous exercise, at best. Again, however, such an award would do little to discourage intentional or grossly negligent conduct.

[12]After the jury's verdict, the court directed both parties to submit briefs and exhibits concerning the proper measure of damages. Wax Coal argued that if the value of the surface mining rights, measured at $3,317.63, was an inappropriate remedy, then the net benefit to Wax Coal should be used. Wax Coal failed to provide the court with the net amount, however, and concluded that "the court has no basis to determine that amount at this time."

V.

For the reasons stated above, the court will award Molinary $190,122.46 under her claim pursuant to § 1270(f), plus reasonable attorney's fees and costs.[13]

ENTER this 24th day of May, 1995.

/s/ Samuel G. Wilson

UNITED STATES DISTRICT JUDGE

---

[13]Wax Coal's motion pursuant to 28 U.S.C. § 1927 will be considered in connection with Molinary's motion for attorney's fees and costs pursuant to 30 U.S.C. § 1270. See note 8.

APPENDIX B

[Filed April 22, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Civil Action No. 91-0007-B

JO D. MOLINARY,
Trustee of the Susan Pruitt Cloud Land Trust,
Plaintiff,

v.

POWELL MOUNTAIN COAL COMPANY, INC.,
doing business as WAX COAL COMPANY,
Defendant.

By: Samuel G. Wilson,
United States District Judge

AMENDED FINAL ORDER

In accordance with the Memorandum Opinion entered on this day, it is hereby **ORDERED** and **ADJUDGED** that:

(1) As defined by this court's order of certification dated March 31, 1992, the class of persons

entitled to recover under this final judgment order is as follows:

All owners of the surface estate of the Pruitt Heirs Tract other than Powell Mountain Coal Company, Inc., d/b/a Wax Coal Company, and related corporations;

(2) Judgment is entered in favor of the members of the class of plaintiffs in the amount of $282,267.38 under their claim for damages pursuant to U.S.C. § 1270(f) against Powell Mountain Coal Company, Inc., d/b/a Wax Coal (Wax Coal). Specifically, the judgment award is:

Damages:	**$190,622.46**
Attorney's Fees:	$86,055.38
Expenses:	$ 5,589.54
Fees and expenses:	**$91,644.92**
Total:	**$282,267.38**

(3) Plaintiff's other claims for relief pursuant to 30 U.S.C. § 1270 are denied;

(4) Judgment is entered in favor of Wax Coal and against plaintiffs on all other state law claims;

(5) Wax Coal's claim pursuant to 28 U.S.C. § 1927 is denied;

(6) Only matters of class administration not affecting the final judgment of the court are retained.

ENTER this April 22nd, 1996.

/s/ Samuel G. Wilson
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 96-1728 and 96-1797

JO D. MOLINARY,
Trustee of the Susan Pruitt Cloud Land Trust,
Plaintiff,

v.

POWELL MOUNTAIN COAL COMPANY, INC.,
doing business as WAX COAL COMPANY,
Defendant.

NATIONAL MINING ASSOCIATION;

UNITED STATES OF AMERICA,
Amici Curiae.

Appeals from the United States District Court
for the Western District of Virginia, at Big Stone Gap.
Samuel G. Wilson, Chief District Judge.
(CA-91-7-B)

Argued: June 3, 1997
Decided: September 11, 1997

Before WILKINS, NIEMEYER, and HAMILTON,
Circuit Judges

Affirmed in part, vacated in part, and remanded by published opinion. Judge Hamilton wrote the opinion, in which Judge Wilkins and Judge Neimeyer joined.

COUNSEL

ARGUED: Stephen McQuiston Hodges, PENN, STUART & ESKRIDGE, Abingdon, Virginia, for Appellant. Ethan Gregory Shenkman, Environment and Natural Resources Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae United States. Walton Davis Morris, Jr., Charlottesville, Virginia, for Appellee. **ON BRIEF:** Timothy W. Gresham, PENN, STUART & ESKRIDGE, Abingdon, Virginia for Appellant. Daniel R. Bieger, COPELAND, MOLINARY & BIEGER, Abingdon, Virginia, for Appellee. Lois J. Schiffer, Assistant Attorney General, John T. Stahr, Environment and Natural Resources Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae United States. Harold P. Quinn, Jr., NATIONAL MINING ASSOCIATION, Washington, D.C., for Amicus Curiae National Mining.

OPINION

HAMILTON, Circuit Judge:

In this appeal, we consider whether § 520(f) of the Surface Mining Control and Reclamation Act of 1997

(SMCRA), 30 U.S.C. § 1270(f), provides a federal cause of action for the recovery of damages resulting from violation of state regulations that are a part of the state's surface coal mining and reclamation regulatory program approved by the United States Secretary of the Interior pursuant to § 503 of SMCRA, 30 U.S.C. § 1253. We hold that it does.

I.

In this suit, Jo D. Molinary represents a class of persons, known as the "Pruitt heirs" (Pruitt Heirs), who own more than a 99% undivided interest in the surface estate of a fifty-acre tract of land located in Lee County, Virginia (the Pruitt Tract). The Powell Mountain Coal Company (Powell Mountain) owns an approximate .14% undivided interest in the surface estate of the Pruitt Tract and, under an 1887 deed, owns a 100% interest in the mineral rights of the Pruitt Tract. The Pruitt Tract is rural, mountainous, and has little economic value apart from its timber and mineral rights. The Pruitt Heirs use it primarily for recreational purposes such as hunting and hiking. Prior to Congress' enactment of SMCRA in 1977, a three-acre portion of the Pruitt Tract was strip mined for coal by parties unrelated to Powell Mountain (the Three Acre Tract). The strip mining left a bench and a high wall on the Three Acre Tract that had not been reclaimed except by nature.

In February 1990, Powell Mountain submitted a permit application to the Division of Mined Land Reclamation for the Commonwealth of Virginia (the DMLR), seeking permission to auger mine[14] the Three Acre Tract for coal that still remained. In its permit application, Powell Mountain listed itself and the

[14]Auger mining is a method of surface mining whereby a large mechanical screw penetrates a coal seam and turns to extract the coal.

"Pruitt Heirs" as cosurface owners but did not list each heir by name. Powell Mountain listed itself as the sole owner of the mineral rights. Powell Mountain also informed the DMLR orally that it had obtained a legal opinion that no lease to extract coal by the auger mining method was required from the other owners of the surface estate. Without further submissions from Powell Mountain, the DMLR issued the permit. Powell Mountain then extracted 4423.51 tons of coal from the Three Acre Tract by the auger mining method. Powell Mountain sold the coal for $190,122.46, clearing $35,909.05 in net income.

After receiving complaints about the permit's issuance, the DMLR determined that Powell Mountain's permit application did not comply with certain state permitting regulations. Specifically, the DMLR determined that the permit application: (1) failed to list the name and address of all record owners as required by Virginia Regulation § 480-03-19.778.13(e) and (2) failed to contain either (a) written consent of the surface owners to extract the coal by surface mining, (b) a copy of a conveyance that expressly granted it the right to extract coal by surface mining, or (c) documentation that under applicable state law, it had the legal authority to extract the coal by surface mining as required by Virginia Regulation § 480-03-19.778.15(b). As a result, the DMLR revoked Powell Mountain's permit, issued a cessation order, and ordered Powell Mountain to reclaim the Three Acre Tract.

Subsequently, this class action was filed in the United States District Court for the Western District of Virginia under SMCRA's citizen suit provision, § 520(f) of SMCRA. *See* 30 U.S.C. § 1270(f). Section 520(f) of SMCRA provides that "[a]ny person who is injured in his person or property through the violation by an operator of any rule, regulation, order, or permit issued pursuant to [SMCRA] may bring an action for

damages (including reasonable attorney and expert witness fees) . . . " *Id.* Relevant to the issues before us, the Pruitt Heirs alleged that Powell Mountain's failure to comply with Virginia Regulations §§ 480-03-19.778.13(e) and 480-03-19.788.15(b) proximately caused the improper issuance of the permit, which in turn resulted in the auger mining of the Three Acre Tract without their consent.[15] The parties later stipulated the total value of the surface mining rights used by Powell Mountain to be $3,317.

Powell Mountain moved to dismiss the complaint for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). In its motion to dismiss, Powell Mountain argued that federal courts lack subject matter jurisdiction over citizen suits in states whose regulatory and enforcement programs have been approved by the Secretary of the Interior (the Secretary) pursuant to § 503 of SMCRA. Rejecting this argument as inconsistent with the plain language of § 520(f) of SMCRA, the district court denied the motion. *See Molinary v. Powell Mountain Coal Co., Inc.*, 779 F. Supp. 839 (W.D. Va. 1991)

The Pruitt Heirs filed a motion for summary judgment as to liability. *See* Fed. R. Civ. P. 56. Powell Mountain filed a cross motion for summary judgment, arguing in part that proximate cause was lacking. The district court rejected this argument and granted summary judgment in favor of the Pruitt Heirs as to liability under § 520(f) of SMCRA. The district court then conducted a jury trial on the sole issue of whether Powell Mountain's regulatory violations were wilful, reckless

---

[15]Initially, the Pruitt Heirs also sought recovery for physical damage to the Three Acre Tract that allegedly resulted from Powell Mountain's failure to properly reclaim it. The Pruitt Heirs later abandoned their reclamation claims in favor of pursuing them through federal administrative proceedings.

or grossly negligent. The jury, presented with a single interrogatory to this effect, answered in the affirmative.

The parties agreed to submit the issues of damages, attorney's fees and costs to the district court for determination. Subsequently, the district court awarded the Pruitt Heirs $190,622.46 in compensatory damages, an amount equal to the gross sales price of the coal. The district court recognized that technically the Pruitt Heirs only suffered a nominal sum of damages, but reasoned that awarding the much larger sum was necessary to "discourage the kind of intentional conduct that occurred in the present case. . . . "(J.A. 300). The district court also awarded the Pruitt Heirs $91,644.92 in costs and attorney's fees. Thus, the district court entered final judgment in favor of the Pruitt Heirs for $282,267.38.

Powell Mountain noted a timely appeal. On appeal, Powell Mountain challenges: (1) the district court's denial of its motion to dismiss for lack of subject matter jurisdiction; (2) the district court's entry of summary judgment as to liability in favor of the Pruitt Heirs; (3) the district court's denial of is motion for summary judgment; and (4) the district court's award of compensatory damages as excessive. The Pruitt Heirs noted a timely cross appeal, in which they challenge the district court's award of attorney's fees as inadequate.

II.

Before we address Powell Mountain's challenge to the district court's denial of its motion to dismiss for lack of subject matter jurisdiction, we briefly set forth some background information about SMCRA and Virginia's federally approved version of SMCRA. Congress enacted SMCRA in 1977 to "establish a nationwide program to protect society and the

environment from the adverse effects of surface coal mining operations." 30 U.S.C. § 1202(a). Section 201 of SMCRA, 30 U.S.C. § 1211, "creates the Office of Surface Mining Reclamation and Enforcement (OSM), within the Department of the Interior, and the Secretary of the Interior (Secretary) acting through OSM, is charged with primary responsibility for administering and implementing [SMCRA] by promulgating regulations and enforcing its provisions." *Hodel v. Virginia Surface Min. & Reclam. Ass'n*, 452 U.S. 264, 268-69 (1981). *See also* 30 U.S.C. §§ 1211, 1224.

To achieve its goals, SMCRA relies on "a program of cooperative federalism that allows States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel* at 289. Any state "wish[ing] to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations" on nonfederal lands within its borders must submit a proposed program to the Secretary for approval. 30 U.S.C. § 1253(a). A state program must include a permitting system that incorporates SMCRA's environmental protection standards and is in accordance with SMCRA's enforcement and procedural requirements. *See Id.* If a state covered by SMCRA fails to propose or implement a satisfactory program, SMCRA requires the Secretary to promulgate and implement a federal regulatory program for that state. *See* 30 U.S.C. § 1254.

In 1979, Virginia enacted the Virginia Surface Mining Control and Reclamation Act of 1979 (VSMCRA) in part to authorize and enable Virginia to submit, and obtain approval of, a permanent state surface coal mining regulatory program and abandoned mine reclamation program pursuant to SMCRA. *See* Va. Code Ann. § 45.1-228. On December 15, 1981, the

Secretary approved this program. *See* 30 C.F.R. § 946.10. Thus, since that date, Virginia has had "exclusive jurisdiction over the regulation" of surface coal mining and reclamation within its borders. *See* U.S.C. § 1253(a).[16]

VSMCRA and its regulations require a coal mining company to obtain a permit before it conducts surface mining operations on a given tract of land within Virginia. *See* Va. Code Ann. § 45.1-234; Va. Regs. Reg. § 480-03-19.773.11(a). The information required in a permit application is determined by VSMCRA and its accompanying regulations. *See* Va. Code Ann. §§ 45.1-235 to 236 and 45.1-242; Va. Regs. Reg. § 480-03-19.72 *et seq*. VSMCRA's citizen suit provision provides that "[a]ny person who as a result of the violation by an operator of any rule, regulation, order, or permit issued pursuant to [VSMCRA], suffers injury to his person or property may bring an action for damages, including reasonable attorney and expert witness fees. Such action may be brought only in the circuit court of the county or city in which the surface coal mining operation complained of is located." Va. Code Ann. § 45.1-246.1.G.

III.

Powell Mountain's theory that jurisdiction is exclusive in the courts of Virginia constitutes a facial attack on the complaint, pursuant to Federal Rule of Civil Procedure 12(b)(1), to dismiss the complaint for lack of subject matter jurisdiction. To the extent that Powell Mountain argues that the activity complained of is not cognizable under § 502(f) of

---

[16]Virginia is one of twenty-four so-called "primacy" states that operate their own programs. Federally implemented programs operate in twelve other "non-primacy" states.

SMCRA, the motion may be treated alternatively as one to dismiss for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). *See Haydo v. Amerikohl Mining, Inc.*, 830 F.2d 494, 495-96 (3d Cir. 1987). Either way, we review *de novo* the district court's legal conclusions surrounding the denial of the motion.

Title 28, U.S.C. § 1331 provides that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." This statutory section is a general federal question statute, which gives district courts original jurisdiction over federally created causes of action unless a specific statute assigns jurisdiction elsewhere. *Int'l Science & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1154 (4th Cir. 1997).

As previously stated, the Pruitt Heirs brought this action in the United States District Court for the Western District of Virginia pursuant to SMCRA's citizen suit provision, § 520(f) of SMCRA. Section 520(f) of SMCRA provides:

> Any person who is injured in his person or property through the violation by any operator of any rule, regulation, order or permit issued pursuant to [SMCRA] may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district in which the surface coal mining operation complained of is located. Nothing in this subsection shall affect the rights established by or limits imposed under State Workmen's Compensation laws.

30 U.S.C. § 1270(f). This provision creates a federal cause of action for the recovery of damages resulting from the violation of "any rule, regulation, order, or permit issued pursuant to [SMCRA]." *Id.* The dispute here centers on whether the statutory phrase "issued pursuant to [SMCRA]," includes state-promulgated regulations that comprise a federally approved state surface mining and reclamation program. More precisely for purposes of this case, the issue is whether the Virginia regulations allegedly violated by Powell Mountain were issued "pursuant to" SMCRA, such that the district court had subject matter jurisdiction over the complaint under § 520(f). Powell Mountain contends that the Virginia regulations were not issued pursuant to SMCRA, while the Pruitt Heirs contend that they were. The Secretary, who has submitted an amicus brief in this case, espouses the same interpretation as the Pruitt Heirs.

Congress has not directly spoken on this precise issue through a provision in SMCRA or its legislative history. Because Congress has not "directly spoken to the precise question at issue," we must sustain the Secretary's interpretation so long as it is "based on a permissible construction of the statute." *Chevron U.S.A. Inc v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).[17] In determining whether an agency's interpretation is a permissible construction of the statute, we need not "conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially

[17]We find no reason to suspect that the Secretary's "interpretation does not reflect the agency's fair and considered judgment on the matter in question." *See Auer v. Robbins*, 117 S.Ct. 905,912 (1997). Thus, the fact that the Secretary's interpretation of the statutory language at issue comes to us in the form of a legal brief "does not, in the circumstances of this case, make it unworthy of deference." *Id.*

had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. Instead, we should "accord considerable deference to the agency's interpretation of the statute, and 'we should not disturb [that interpretation] unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Akindemowo v. INS*, 61 F.3d 282, 284 (4th Cir. 1995) (*quoting Chevron*, 467 U.S. at 845). For the following reasons, we conclude that the interpretation espoused by the Secretary is a permissible construction of § 520(f) of SMCRA.

First, the language at issue is certainly broad enough to support the Secretary's interpretation. It may reasonably be said that once the Secretary approves a state surface coal mining and reclamation program, the rules, regulations, orders, and permits issued under that program are "issued," in the language of § 520(f), "pursuant to" SMCRA.

Second, creating a federal cause of action so that citizens may redress violations of state surface coal mining and reclamation regulations in federal court is consistent with Congress' goal of establishing "a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. § 1202(a).

Third, as the Secretary points out in its *amicus* brief, when Congress referred to permits issued by either state or federal regulatory authorities elsewhere in SMCRA, it used the phrase, "permit issued pursuant to this chapter." *See e.g.*, 30 U.S.C. §§ 1256(d)(1), 1261(b), 1272(a)(6). By contrast, when Congress intended to limit the application of a provision to permits or orders issued pursuant to a federal program, it did so expressly. *See e.g.*, 30 U.S.C. §§ 1268(e)-(f) ("permit issued pursuant to a Federal program"); 1273(b) ("permit issued by the

Secretary"); 1275(a)(1) & (c) ("notice or order" issued "pursuant to Federal Program").

Fourth and finally, as the Secretary also points out, its interpretation is consistent with the operation of § 520(a)(1) of SMCRA, which provides for citizen suits to ensure compliance with the "provisions of [SMCRA] or of any rule, regulation, order or permit issued pursuant thereto." 30 U.S.C. § 1270(a)(1) in conjunction with the operation of § 520(b) of SMCRA, which places limits on the initiation of such suits. Section § 520(b)(1)(B) of SMCRA states that a suit may not be commenced under § 520(a)(1) if "the Secretary or the State" is already "diligently prosecuting a civil action . . . to require compliance." 30 U.S.C. § 1270(b)(1)(B). Because a state would only prosecute a compliance action if it were a primacy state, that language of these subsections shows that Congress contemplated that federal citizen suits for compliance would be brought in primacy states. Considering that the key language in § 520(a)(1) of SMCRA is virtually identical to the key language in § 520(f) of SMCRA, it follows that Congress intended § 520(f) of SMCRA to provide for federal citizen suits for damages in primacy states.

The Secretary's interpretation does not conflict, as Powell Mountain suggest, with the federal grant of "exclusive regulatory jurisdiction over the regulation of surface coal mining and reclamation operations" in § 520(f) of SMCRA to states with federally approved surface coal mining and reclamation programs. *See* 30 U.S.C. §1253(a). Exclusive regulatory jurisdiction simply does not encompass exclusive adjudicatory jurisdiction. Common sense dictates that a government's acts in regulating a subject are distinctly

difference than its acts in adjudicating a party's rights related to the subject.[18]

Because Congress has not specifically assigned jurisdiction over §520(f) suits elsewhere, we conclude the district court possessed subject matter jurisdiction pursuant to 38 U.S.C. §1331. *Int'l Science & Tech. Inst., Inc.*, 106 F.3d at 1154. Thus, we affirm the district court's denial of Powell Mountains' motion to dismiss.

IV.

We next address Powell Mountain's challenge to the district court's grant of summary judgment in favor of the Pruitt Heirs. According to Powell Mountain, summary judgment in favor of the Pruitt Heirs was inappropriate because the evidence does not establish proximate cause.

To prevail on a motion for summary judgment, a party must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) he is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). We review the district court's grant of summary judgment *de novo*, viewing the evidence in

---

[18]In *Haydo v. Amerikohl Mining, Inc.*, 830 F.2d 494 (3d Cir. 1987), the Third Circuit refused to make this distinction. In that case, the court concluded that reading the language of § 503(a) of SMCRA in conjunction with § 520(f) of SMCRA compelled the conclusion that a state regulation connected to a federally approved regulatory program was not "issued pursuant to [SMCRA]," in the language of § 520(f) of SMCRA. *Id.* at 497. AS the district court in the present case correctly recognized, the holding in *Haydo* ignores the fact that the word "exclusive" in §503(a) modifies the phrase "regulatory jurisdiction," and nothing more. The Third Circuit is the only federal appellate court that has addressed the scope of the phrase "issued pursuant to [SMCRA]," as found in §520(f) of SMCRA.

the light most favorable to the nonmoving party. *See Burns v. AAF-McQuay*, 96 F.3d 728 (4th Cir. 1996).

The parties agree that the Pruitt Heirs cannot prevail in this action unless they prove by a preponderance of the evidence that Powell Mountain's failure to comply with Virginia Regulation § 480-03-19.778.13(e), requiring the names and addresses of all surface owners in surface mining permit application, and § 480-03-19.778.15(b), requiring right of entry information, proximately caused the damages they alleged (the auger mining of the Three Acre Tract without their consent as surface owners.) *See* 30 U.S.C. § 1270(f) ("Any person who is injured in his person or property *through* the violation by any rule, regulation, order, or permit issued pursuant to [SMCRA] may bring an action for damages . . . ." (emphasis added)). The parties doe not dispute that, for the purposes here, proximate cause is defined as an "'act or omission which, in natural and continuance sequence, unbroken by an efficient, intervening cause, produces the event, and without which that event would not have occurred'". *Jenkins v. Payne*, 465 S.E. 2d 795, 798 (Va. 1996) (quoting *Beal v. Jones*, 171 S.E. 2d 851, 853 (Va. 1970).

Application of the summary judgment standard here compels us to conclude that the Pruitt Heirs were not entitled to summary judgment on the issue of liability. The record is devoid of evidence that Powell Mountain's failure to list all of the surface co-owners of the Pruitt tract on its permit application and/or its failure to submit right of entry documentation, "in natural and continuous sequence, unbroken by an efficient intervening cause," caused the auger mining of the Three Acre Tract without their consent. *Id.* Furthermore, the only evidence in the record on this issue cuts in favor of Powell Mountain. That evidence is the testimony of Bob

Blackstock (Blackstock), the DMLR permitting officer who approved the permit at issue in this case. His testimony shows that it was the common practice of the DMLR, at all relevant times, to approve permits for surface coal mining that did not comply with the two regulations at issue. Specifically, with respect to Virginia Regulation § 480-03-19.778.13(e), requiring the names and addresses of all surface owners in the permit application. Blackstock testified that it was "more common than not" that the DMLR approved permits that identified surface owner heirs only by their family name, such as was done here. With respect to § 480-03-19-778.15(b), requiring right of entry information in the form of either written consent, a conveyance of the right to extract coal by surface mining, or documentation of legal authority to extract coal by surface mining, Blackstock testified that it was the common practice of the DMLR at the time to approve permit applications that attempted to comply with this regulation by way of a written consent of fewer than all surface owners. Indeed, Blackstock testified that the consent of only one surface owner was sufficient even if more than one surface owner existed.

At bottom, the practices just outlined served as an efficient intervening cause, breaking the causal chain between Powell Mountain's violation of the regulations at issue and the damage alleged by the Pruitt Heirs. Put another way, the undisputed evidence in the record establishes that the Pruitt Heirs suffered damage because the permitting officer routinely approved permits based on incomplete permit applications, not because the incompleteness of Powell Mountain's permit application *induced* the permitting officer to approve it.

Despite the Pruitt Heirs' contention to the contrary, the fact that the DMLR revoked the permit *after* it received complaints about the incomplete nature of Powell Mountain's

permit application is not evidence of proximate cause. The subsequent revocation simply does not speak to whether the incompleteness of the permit application induced the permitting officer to issue Powell Mountain the permit in the first place. Because there is no evidence of proximate cause in the record, we hold the district court erred in denying Powell Mountain's motion for summary judgment.

V.

In conclusion, we hold that the district court: (1) properly denied Powell Mountain's motion to dismiss; (2) erroneously granted the Pruitt Heirs' motion for summary judgment as to liability; and (3) erroneously denied Powell Mountain's motion for summary judgment. Accordingly, we: (1) affirm the district court's denial of Powell Mountain's motion to dismiss; (2) vacate the district court's entry of summary judgment as to liability in favor of the Pruitt Heirs; (3) vacate the district court's final judgment; and (4) remand with instructions that the district court enter summary judgment in favor of Powell Mountain.[19]

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

---

[19]In light of our disposition, the other issues raised by Powell Mountain's appeal are moot, as well as the issues raised by Pruitt Heirs' cross appeal.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 96-1728 and 96-1797

JO D. MOLINARY,
Trustee of the Susan Pruitt Cloud Land Trust,

Plaintiff,

v.

POWELL MOUNTAIN COAL COMPANY, INC.,
doing business as WAX COAL COMPANY,

Defendant.

NATIONAL MINING ASSOCIATION;

UNITED STATES OF AMERICA,

Amici Curiae.

Filed October 7, 1997

On Petition for Rehearing with Suggestion for Rehearing in Banc

---

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the paned considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX E

THE TEXT OF MATERIAL STATUTES AND REGULATIONS

I.

STATUTES

30 U.S.C. §1202. Statement of purpose
It is the purpose of this Act to --

(a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;

(b) assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations;

. . .

30 U.S.C. §1256. Permits
(a) Persons engaged in surface coal mining within State; time limit; exception. No later than eight months from the date on which a State program is approved by the Secretary, pursuant to section 503 of this Act, or no later than eight months from the date on which the Secretary has promulgated a Federal program for a State not having a State program pursuant to section 504 of this Act, no person shall engage in or carry out on lands within a State any surface coal mining operations unless such person has first obtained a permit issued by such State pursuant to an approved State program or by the Secretary pursuant to a Federal program;

. . .

30 U.S.C. §1260. Permit approval or denial.

(a) Upon the basis of a complete mining application and reclamation plan or a revision or renewal thereof, as required by this Act and pursuant to an approved State program or Federal program under the provisions of this Act, includiing public notification and an opportunity for a public hearing as required by section 513, the regulatory authority shall grant, require modification of, or deny the application for a permit in a reasonable time set by the regulatory authority and notify the applicant in writing. The applicant for a permit, or revision of a permit, shall have the burden of establishing that his application is in compliance with all the requirements of the applicable State or Federal program. Within ten days after the granting of a permit, the regulatory authority shall notify the local governmental officials in the local political subdivision in which the area of land to be affected is located that a permit has been issued and shall describe the location of the land.

(b) No permit or revision application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing on the basis of the information set forth in the application or from information otherwise available which will be documented in the approval, and made available to the applicant, that --

(1) the permit application is accurate and complete and that all the requirements of this Act and the State or Federal program have been complied with;

. . .

(6) in cases where the private mineral estate has been severed from the private surface estate, the applicant has submitted to the regulatory authority --

(A) the written consent of the surface owner to the extraction of coal by surface mining methods; or

(B) a conveyance that expressly grants or reserves the right to extract the coal by surface mining methods; or

(C) if the conveyance does not expressly grant the right to extract coal by surface mining methods, the surface-subsurface legal relationship shall be determined in accordance with State law; Provided, That nothing in this Act shall be construed to authorize the regulatory authority to adjudicate property rights disputes.

. . .

30 U.S.C. §1270. Citizen suits

(a) Civil action to compel compliance with 30 U.S.C. §§1201 et seq. Except as provided in subsection (b) of this section, any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this Act--

(1) against the United States or any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the constitution which is alleged to be in violation of the provisions of this Act or of any rule, regulation, order or permit issued pursuant thereto, or against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this title; or

(2) against the Secretary or the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution where there is alleged a failure of the Secretary or the appropriate State regulatory authority to perform any act or duty under this Act which is not discretionary with the Secretary or with the appropriate State regulatory authority.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties.

. . .

(f) Action for damages. Any person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this Act may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district in which the surface coal mining operation complained of is located. Nothing in this subsection shall affect the rights established by or limits imposed under State Workmen's Compensation laws.

II.

VIRGINIA REGULATIONS

4 V.A.C. § 25-130-773.11(a). All operations . No person shall engage in or carry out any surface coal mining operations, unless such person has first obtained a permit issued by the Division, except as provided for in Paragraph (b) of this Section. A permittee need not renew the permit if no surface coal mining operations will be conducted under the permit and solely reclamation activities remain to be done. Obligations established under a permit continue until completion of surface coal mining and reclamation operations, regardless of whether the authorization to conduct surface coal mining operations has expired or has been terminated, revoked, or suspended.

4 V.A.C. § 25-130-773.15(c)(1). Written findings for permit application approval. No permit application or application for a significant revision of a permit shall be approved unless the application affirmatively demonstrates and the Division finds, in writing, on the basis of information set forth in the

application or from information otherwise available that is documented in the approval, the following:

(1) The application is complete and accurate and the applicant has complied with all requirements of the Act and this Chapter.

4 V.A.C. § 25-130-778.13. Identification Of Interests

An application shall contain the following information, except that the submission of a social security number is voluntary:

. . .

(e) The name and address of each legal or equitable owner of record of the surface and mineral property to be mined, each holder of record of any leasehold interest in the property to be mined, and any purchaser of record under a real estate contract for the property to be mined.

. . .

§480-03-19.778.15 Right-Of-Entry Information

(a) An application shall contain a description of the documents upon which the applicant bases his legal right to enter and begin surface coal mining and reclamation operations in the permit area and shall state whether that right is the subject of pending litigation. The description shall identify the documents by type and date of execution, identify the specific lands to which the document pertains, and explain the legal rights claimed by the applicant.

(b) Where the private mineral estate to be mined has been severed from the private surface estate, an applicant shall also submit--

(1) A copy of the written consent of the surface owner for the extraction of coal by surface mining methods; or

(2) A copy of the conveyance that expressly grants or reserves the right to extract coal by surface mining methods; or

(3) If the conveyance does not expressly grant the right to extract the coal by surface mining methods, documentation that under applicable State law, the applicant has the legal authority to extract the coal by those methods.

(c) Nothing in this Section shall be construed to provide the Division with the authority to adjudicate property rights disputes.